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Community Interests in the Identification of International Law

With a Special Emphasis on Treaty Interpretation and Customary Law Identification

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While States mainly pursue their individual interests, there is nothing extraordinary in their acting for the protection of general interests, even those belonging to the international community.¹

I. Introduction

While the protection of community interests in the content and structure of contemporary international law,² their means of enforcement,³ and the related responsibility regime⁴ have been mapped extensively, their exact relevance in the identification and

interpretation of international law⁵ has not been explored in detail and still needs to be assessed.⁶

Curiously, the starting point in the debate is usually, and it is the case in the present volume as well, that international lawmaking by states is self-interested, on the one hand, and accordingly necessarily conflicts with community interests, on the other. This way of framing the issue is misleading for the reasons explained in the previous chapter. In short, such critiques underestimate, on the one hand, the collective nature of states and their interests, and too quickly assimilate them to individuals, but also ignore the potential contribution that the institutional design of states, especially democratic states, can have on the protection of domestic and international community interests. On the other hand, they neglect the widespread and persistent reasonable disagreement there is about what community interests actually amount to and the importance of democratic state consent in their identification in the absence of a central international lawmaker able to determine our community interests in a democratic way.

The present chapter goes one step further and aims, first of all, at identifying the ways in which community interests are channeled into the identification and interpretation of international law and, second, at the same time, at assessing these developments normatively. Like Gaja in the opening quotation, it argues that there is nothing extraordinary in states' ability to act for the protection of community interests. In short, instead of looking at how the rules of the international system are bent to accommodate community interests, the chapter's argument is that existing treaty-interpretation and custom-identification rules are already such that they enable states to protect community interests and should merely be put into practice more effectively and transparently.

Of course, the issue of the relevance of community interests and their protection in international lawmaking is vast. As a matter of fact, its scope remains tantalizing

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¹ Giorgio Gaja, *The Protection of General Interests in the International Community*, 364 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 9, 31 (2011).

² See, e.g., Bruno Simma, *From Bilateralism to Community Interest in International Law*, 250 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 217 (1994); Gaja, *supra* note 1; FROM BILATERALISM TO COMMUNITY INTEREST (Ulrich Fastenrath et al. eds., 2011); THE COMMON INTEREST IN INTERNATIONAL LAW (Wolfgang Benedek et al. eds., 2014).

³ See, e.g., CHRISTIAN J. TAMS, ENFORCING OBLIGATIONS ERGA OMNES IN INTERNATIONAL LAW (2005); Christian J. Tams, *Individual States as Guardians of Community Interests*, in FROM BILATERALISM TO COMMUNITY INTEREST, *supra* note 2, at 379; James Crawford, *Chance, Order, Change: The Course of International Law*, 365 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 9, 194 (2013).

⁴ See, e.g., James Crawford, *Responsibility for Breaches of Communitarian Norms: An Appraisal of Article 48 of the ILC Articles on the Responsibility of States for Internationally Wrongful Acts*, in FROM BILATERALISM TO COMMUNITY INTEREST, *supra* note 2, at 224; Christian J. Tams & Alessandra Asteriti, *Erga Omnes, Jus Cogens and Their Impact on the Law of State Responsibility*, in THE INTERNATIONAL RESPONSIBILITY OF THE EUROPEAN UNION—EUROPEAN AND INTERNATIONAL PERSPECTIVES 163 (Malcolm D. Evans & Panos Koutrakos eds., 2013).

⁵ But see Shabtai Rosenne, *Bilateralism and Community Interest in the Codified Law of Treaties*, in TRANSNATIONAL LAW IN A CHANGING SOCIETY: ESSAYS IN HONOR OF PHILIP C. JESSUP 202 (Wolfgang Friedmann, Louis Henkin & Oliver Lissitzyn eds., 1982); Fouad Zarbiev, *L'interprétation téléologique des traités comme instrument de prise en compte et de mise en balance des valeurs et intérêts environnementaux*, in LA CIRCULATION DES CONCEPTS JURIDIQUES: LE DROIT INTERNATIONAL DE L'ENVIRONNEMENT: ENTRE MONDIALISATION ET FRAGMENTATION (Hélène Ruiz Fabri & Lorenzo Gradoni eds., 2009); Jan Klabbbers, *The Community Interest in the Law of Treaties: Ambivalent Conceptions*, in FROM BILATERALISM TO COMMUNITY INTEREST, *supra* note 2, at 768; Kenneth Keith, *Bilateralism and Community in Treaty Law and Practice—of Warriors, Workers, and (Hook-)Worms*, in FROM BILATERALISM TO COMMUNITY INTEREST, *supra* note 2, at 754.

⁶ There is no mention of "community interests" as such in the ILC Reports on the identification and formation of customary international law (Michael Wood (Special Rapporteur), *First Rep. on Formation and Evidence of Customary International Law*, U.N. Doc. A/CN.4/663 (May 17, 2013); Michael Wood (Special Rapporteur), *Second Rep. on Identification of Customary International Law*, U.N. Doc. A/CN.4/672 (May 22, 2014) [hereinafter Wood, *Second Rep.*]; Michael Wood (Special Rapporteur), *Third Rep. on Identification of Customary International Law*, U.N. Doc. A/CN.4/682 (Mar. 27, 2015) [hereinafter Wood, *Third Rep.*]) or in the ILC Reports on subsequent agreements and subsequent practice in relation to treaty interpretation (see, e.g., Georg Nolte (Special Rapporteur), *First Rep. on Subsequent Agreements and Subsequent Practice in Relation to Treaty Interpretation*, U.N. Doc. A/CN.4/660 (Mar. 19, 2013); Georg Nolte (Special Rapporteur), *Second Rep. on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties*, U.N. Doc. A/CN.4/671 (Mar. 26, 2014); Georg Nolte (Special Rapporteur), *Third Rep. on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties*, U.N. Doc. A/CN.4/683 (Apr. 7, 2015)).

even if, on the one hand, one focuses, as this chapter does, on the *identification* and *interpretation* of international law, thereby leaving aside both its creation and its enforcement, and even if one addresses more particularly, on the other hand, the interpretation of *treaties* and the identification of *customary international law*, thereby excluding the identification of other sources of international law such as international organizations' law and the role of international adjudication therein. Two further restrictions of the chapter's scope are needed therefore. First of all, the chapter discusses the relevance of community interests in the identification and interpretation of treaty and customary law norms *generally*, and hence *across regimes* of international law. Its main example, however, is international human rights law because of its interesting characteristics in this context. Second, the chapter focuses on the identification and interpretation by *international institutions*, mostly international and regional courts (and mostly the International Court of Justice (ICJ) and the European Court of Human Rights (ECtHR)). Some dimensions of the domestic practice of identification and interpretation of international law are considered, however, albeit only when relevant and despite the noncomparative scope of the study.

Within these boundaries, some further topics are excluded from the chapter's scope because they are addressed in other chapters of the volume. First of all, the chapter does not address the role of *international organizations'* law for the formulation and promotion of community interests.⁷ Some of those organizations' treaties and the interpretation thereof are discussed, but *qua* ordinary treaties, and without reference to the specificities of their interpretation under international treaty law⁸ (e.g., Articles 4–5 of the Vienna Convention on the Law of Treaties (VCLT)⁹) or to that of their respective organizations' secondary law pertaining to community interests. Nor, secondly, does the chapter include a detailed discussion of the contribution of domestic or international *courts* to the protection of community interests in the identification and interpretation of treaties and customary law.¹⁰ Some of their case law is discussed, but not in depth and, importantly, not by reference to the institutional aspects of the pivotal role of the domestic or international judiciary and of judicial reasoning for the identification and interpretation of community interests.

The structure of the proposed argument is four-pronged. Section II explains what the “relevance” of community interests in the “identification” of international law means in this chapter. Section III explains how community interests can

⁷ See, e.g., Alan E. Boyle, *Saving the World? Implementation and Enforcement of International Environmental Law Through International Institutions*, 3 J. ENVTL. L. 229 (1991).

⁸ See, e.g., Christopher Peters, *Subsequent Practice and Established Practice of International Organizations: Two Sides of the Same Coin?*, 3 GOETTINGEN J. INT'L L. 617 (2011).

⁹ Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

¹⁰ See, e.g., Vera Gowlland-Debbas, *Judicial Insights into Fundamental Values and Interests of the International Community*, in THE INTERNATIONAL COURT OF JUSTICE: ITS FUTURE ROLE AFTER 50 YEARS 327 (A. Sam Muller et al. eds., 1996); Gleider I. Hernandez, *A Reluctant Guardian: The International Court of Justice and the Concept of “International Community”*, 83 BRIT. Y.B. INT'L L. 13 (2013); Bruno Simma, *Human Rights Before the International Court of Justice: Community Interests Coming to Life?*, in 1 COEXISTENCE, COOPERATION AND SOLIDARITY: LIBER AMICORUM RÜDIGER WOLFRUM 577 (Holger P. Hestermeyer et al. eds., 2012); Yoshiyuki Lee-Iwamoto, *The ICJ as a Guardian of Community Interests? Legal Limitations on the Use of Provisional Measures*, in INTERNATIONAL LAW IN THE NEW AGE OF GLOBALIZATION 71 (Andrew Byrnes, Mika Hayashi & Christopher Michaelsen eds., 2013).

be of relevance in the context of the identification and interpretation of international law in general. Section IV broaches the issue of how community interests are channeled into the interpretation of treaties. Finally, Section V addresses the relevance of community interests in the identification of customary international law and Section VI concludes.

II. The Relevance of Community Interests in the Identification of International Law

As I explained in the previous chapter, community interests are best understood as interests (i) that are common (ii) and/or belong to a community (iii). International legal norms actually protecting community interests are referred to as “community interest norms”¹¹ or even “communitarian norms.”¹² Community interests can play different roles and be of variable relevance in the identification of international law. Before explaining what community interests’ “relevance” amounts to, one first needs to establish what the “identification” of international law actually consists in.

First of all, regarding the *identification of international law*, this chapter focuses on the identification of international law norms and their interpretation, with respect to treaties and custom. It excludes therefore, first of all, international lawmaking itself, and in particular the conclusion of treaties and the formation of custom, and, secondly, the enforcement of international law once it has been implemented and applied to a given case. Of course, identification and interpretation are best understood as an extension of lawmaking, albeit in the context of the implementation of international law, and are then also a condition for its enforcement. It is difficult therefore to keep them apart entirely. As a matter of fact, the identification and interpretation of international law norms, be they treaty-based or customary, are difficult to distinguish from one another to the extent that interpretation is often necessary to ascertain a given norm, and vice-versa.

There are various reasons for this focus on legal identification and interpretation rather than lawmaking and enforcement. One of them is that, unlike the formation of a given abstract norm, its identification and interpretation in a concrete case may allow for other interests, including community interests, to be taken into account. To start with, this is because, as I will argue later in the chapter, other norms and duties binding the same subjects apply concurrently at that stage and have to be considered at the same time, including concurrent or even conflicting community interest norms in some cases. Another reason amounts to the different identity of the actors at stake: While treaties or customs arise from the convergence of many states' explicit consent or practice, their identification and interpretation belong either to individual domestic states in their decentralized implementation function,¹³ on the one hand, or to international institutions, usually of a judicial nature, on the other. The fact that different actors besides states are involved in that process, and especially judicial institutions, contributes, as I will argue later in the chapter, to bringing

¹¹ See Isabel Feichtner, *Community Interest*, in 2 MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 2 (Rüdiger Wolfrum ed., 2012).

¹² See, e.g., Crawford, *supra* note 3, at 204.

¹³ See Tams, *supra* note 3, at 381.

distinct conceptions of community interests to the fore or, at least, new conceptions thereof that are informed by a new context.

Secondly, regarding the *relevance* of community interests in the identification of international law, there are many ways to understand our object in this chapter. Its focus may be, first, on the identification and interpretation of international law norms that are community interest norms; second, on the identification and interpretation of international law norms by reference to community interest norms; or third, on the identification and interpretation of international law norms that are community interest norms by reference to other community interest norms. All three topics are equally interesting, but do not raise the same questions with respect to legal identification and interpretation. They may actually even overlap in some cases. Furthermore, depending on the understanding of community interest norms that is used (i.e., community interests *qua* object, type, structure, source, and/or purpose of the international legal norm, as I explained in the previous chapter), the relevance of community interests to the identification of custom and the interpretation of treaties may vary greatly. In turn, this may suggest that the question of the relevance of community interests in the identification of international law remains a largely indeterminate question.

At any rate, the relevance of community interests in the identification of international law should not be conflated with two structural features of contemporary international law.

The first is the *hierarchy* and the *de-fragmentation* of international law. Since community interests usually amount to fundamental interests, as I explained in the previous chapter, it is easy to see how one could regard community interests as generating normative hierarchies in international law. While it may be the case, there is no necessary connection between the two. First of all, some community interests are not protected by peremptory norms, as confirmed by the now classical debates pertaining to the distinction between *erga omnes* duties and *jus cogens* norms,¹⁴ or by the role of international *ordre public* played by certain (nonperemptory) international human rights norms.¹⁵ Second, some normative hierarchies under international law do not protect community interests, as illustrated by reference to Article 103 of the United Nations Charter. The same may be argued, by extension, about the potential role community interests may play in solving normative conflicts and especially for the alleged “de-fragmentation” of international law: Their role as rules of conflict is not granted and not all rules of conflict in international law actually protect community interests (e.g., the *lex posterior* or *lex specialis* rules).¹⁶ Of course, this is not to say that community interests cannot help to prevent normative conflicts in international law, for

¹⁴ See Tams, *supra* note 3; Crawford, *supra* note 3, at 199–201, by reference to the conflation in Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain), Judgment, 1970 I.C.J. Rep. 3 (Feb. 5) [hereinafter Barcelona Traction case].

¹⁵ See, e.g., Loizidou v. Turkey, 1996-VI Eur. Ct. H.R. ¶ 93 (1997).

¹⁶ See also José E. Alvarez, *Beware: Boundary Crossings*, in *BOUNDARIES OF STATE, BOUNDARIES OF RIGHTS—HUMAN RIGHTS, PRIVATE ACTORS, AND POSITIVE OBLIGATIONS* 43 (Tsvi Kahana & Anat Scolnicov eds., 2016).

instance through the systemic interpretation¹⁷ of certain treaty norms by reference to community interest norms like international human rights law, as we will see, but their role as conflict rules is not established.

The second structural feature is the *constitutionalization* of international law. Mainly by reference to their importance, the relevance of community interests in international law is sometimes considered to be a confirmation of the constitutional dimension of international law. The connection between the two derives from the alleged constitutional nature of some or all community values and interests (e.g., international human rights¹⁸), but also from their alleged constitutive role in and/or of the international community.¹⁹ Again, while there are clear links between the two features of international law, the constitutional discourse ascribes a political and public law dimension to community interest norms, and international law more generally, that they do not necessarily have (yet).²⁰

III. Community Interests and the Identification of International Law in General

Before turning to the relevance of community interests in the identification of custom and the interpretation of treaties, it is important to discuss two cross-cutting issues pertaining to their relevance in the identification of international law in general.

The first issue is the *identity* of the identifiers and interpreters of international law, whose characteristics should be emphasized with respect to the protection of community interests.

The first feature is that most of the identification and interpretation of international law occurs as *self-identification* and *self-interpretation*, and hence in a *decentralized* fashion, by states and their respective domestic authorities. This raises the question whether these are necessarily self-referential in terms of interests. However, as I argued in the previous chapter with respect to state consent, the answer to this question is negative. This is because states' interests also include domestic and global community interests, and because states, especially democratic ones, are collective entities whose institutional design can aim at including the protection of community interests, including in their external policy. Depending on the international law regime, moreover, some international institutions may actually also contribute additionally to the identification and interpretation of international law norms. Of course, one should

¹⁷ See Campbell McLachlan, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, 54 INT'L & COMP. L.Q. 279, 285–86 (2005); Study Group on the Fragmentation of International Law, *Rep. on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, ¶¶ 411–12, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006) (finalized by Martti Koskenniemi).

¹⁸ See Stephen Gardbaum, *Human Rights as International Constitutional Rights*, 19 EUR. J. INT'L L. 749 (2008).

¹⁹ See Gaja, *supra* note 2; Crawford, *supra* note 3, at 322–42.

²⁰ See Samantha Besson, *Whose Constitution(s)? International Law, Constitutionalism and Democracy, in RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE* 381 (Jeffrey L. Dunoff & Joel P. Trachtman eds., 2009). See also Alvarez, *supra* note 16.

not assume too readily that international institutions are necessarily more prone to consider community interests because they are international. As a matter of fact, the rules on the interpretation of treaties and the identification of custom apply equally to both domestic and international institutions. Further, as we will see, domestic determinations constrain both the systemic and evolutive interpretations developed by international institutions. This should not come as a surprise in view of the argument I made in the previous chapter relative to the democratizing role and deliberative function of state consent and practice in the determination of community interests.

The second institutional specificity that may affect how community interests are taken into account in the identification and interpretation of international law is that most of it is *judicial* in nature, whether at the domestic or international level. Of course, depending on the area of international law where community interest norms are interpreted or identified, other political institutions, whether domestic or international, may also be involved before or after that judicial stage, or even concurrently. The mutual irritation induced by the separation of powers domestically, but also between the domestic and the international levels, and by the coexistence of concurrent legislative, executive, and judicial interpretations of treaties/identification of custom, may actually contribute to enhancing their quality and the chances of taking community interests into account.²¹ Interestingly, however, (domestic and international) judicial identifications and interpretations of international law have a particular authority, across regimes, mostly because of the specific nature and constraints of judicial reasoning. As a matter of fact, one of the features of judicial reasoning that matters particularly for the protection of community interests is the role general principles of international law play therein.

The second issue is the role of *general principles* in the identification and interpretation of international law. Because many community interest norms happen to be general principles and because general principles often protect community interests, general principles are an important vehicle for taking community interests into account in the identification of international law. As a matter of fact, general principles are used both as a type of international legal norm and as a source of international law,²² thereby making the reference to community interests even easier in practice. *Qua* source of international law, general principles do not depend on state practice and can therefore be used to escape the cumbersome identification of customary international law in some cases.²³ This is particularly clear in domestic and international judicial reasoning given how closely related principles are to judicial reasoning. As a matter of fact, the ICJ has regularly referred to general principles of international law

²¹ See, for example, for the Swiss practice, Samantha Besson & Odile Ammann, *La pratique suisse de détermination du droit international coutumier*, 21 CAHIERS FRIBOURGEOIS DE DROIT EUROPÉEN 30–1 and 40–1 (2016), http://www.unifr.ch/ius/euroinstitut_fr/forschung/publikationen/freiburger_schriften (study commissioned by the Swiss Federal Department of Foreign Affairs at the request of ILC Special Rapporteur Wood).

²² See, e.g., Samantha Besson, *General Principles in International Law—Whose Principles?*, in LES PRINCIPES EN DROIT EUROPÉEN—PRINCIPLES IN EUROPEAN LAW 19 (Samantha Besson & Pascal Pichonnaz eds., 2011); Pierre d'Argent, *Les principes généraux à la Cour internationale de Justice*, in LES PRINCIPES EN DROIT EUROPÉEN—PRINCIPLES IN EUROPEAN LAW, *supra*, at 107.

²³ See, e.g., d'Argent, *supra* note 22.

in its case law, including in order to protect community interests.²⁴ Importantly for our purpose, these references to general principles are not done clearly as references to a source of international law, but do not comply with the usual reasoning for the identification of customary international norms either. As we will see in the context of customary law identification, this relaxed approach to the origin of general principles facilitates taking community interests into account in domestic and international judicial decisions.

Among the various functions of general principles in practice, one should mention the promotion of coherence and systematicity in judicial reasoning, on the one hand, and the development of an axiological hierarchy between norms of international law stemming from different sources and regimes, on the other.²⁵ The protection of community interests through general principles fits both roles really well, as I explained in the previous section. Of course, using general principles to achieve those aims also raises the issue of the constraints weighing on judicial discretion in international law. One may indeed question the creative reference to general principles in international adjudication, both from a democratic legitimacy perspective and that of parochialism and imperialism.²⁶ As I explained in the previous chapter, an egalitarian and epistemic corrective may be for international courts to grant democratic states a margin of appreciation and thereby to give (states)people a say in the identification and interpretation of community interest norms.

IV. Community Interests and Treaty Interpretation

In order to present and assess the relevance of community interests in the interpretation of treaties, it is important to start by explaining how community interests relate to international treaty law in general, before moving to treaty interpretation itself.

A. Community interests in international treaty law

International treaty law is often described as being incompatible with the promotion and protection of community interests.²⁷ This is allegedly because the structure of treaties themselves is contract-like, hence reciprocal and bilateral. In turn, this is said to make various features of treaty law, which reflect the contractual structure of treaties, difficult to reconcile with the specificities of multilateral treaties and especially those that contain multilateral rights and duties like community interest norms.

²⁴ See, e.g., Barcelona Traction case, *supra* note 14, ¶ 34; Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 218 (June 27) [hereinafter Nicaragua case]; Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, 2010 I.C.J. Rep. 14, ¶ 57 (Apr. 20) [hereinafter Pulp Mills]. See Hernandez, *supra* note 10; Yoshiyuki Lee-Iwamoto, *supra* note 10.

²⁵ See Besson, *supra* note 22.

²⁶ See Samantha Besson, *Legal Philosophical Issues of International Adjudication—Getting Over the Amour Impossible Between International Law and Adjudication*, in THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 413 (Karen Alter, Cesare Romano & Yuval Shany eds., 2014).

²⁷ See Klabbers, *supra* note 5, at 770.

In light of this, some authors have suggested different routes in order to accommodate community interests in international treaty law. One approach, endorsed by Paulus, recommends that we “bilateralize” the interpretation and enforcement of treaties protecting community interests.²⁸ Not only does this sound counterproductive for community interests, but it is not necessary, as we will see. A second approach suggests using what Klabbers refers to as the “secret trapdoors” of treaty law,²⁹ such as, for instance, the humanitarian exception to Article 60(5) of the VCLT, the invalidity rule of Article 53 of the VCLT, or the “objective regime” exceptions to Articles 33–38 of the VCLT on *pacta tertiis*.³⁰ Yet a third proposal consists in developing special regimes of treaty law for multilateral treaties protecting community interests. In this last respect, it is worth noting, however, that the International Law Commission (ILC)’s 2006 Report on Fragmentation could trace none. The report actually demonstrates that all multilateral treaties concluded under special regimes protecting community interests can be, and actually are, interpreted by reference to the VCLT.³¹

As I explained in the previous chapter by reference to state consent, the reciprocal structure of treaties is not a necessary conceptual feature of treaties. This actually explains how legislative or multilateral treaties, like international human rights treaties, have arisen over time despite being submitted to the VCLT. It also explains various features of treaty law that are best regarded as mainstream, rather than as exceptions in an allegedly contract-oriented framework. One may mention treaty law rules on reservations, succession, or termination/suspension where multilateral treaties concluded in regimes as varied as international humanitarian law, international human rights law,³² international labor law, or international environmental law are treated as such and not corseted into bilateral treaty rules or principles.³³ As a result, there is no clear incompatibility between international treaty law and multilateral treaties protecting community interests.

B. Community interests in the interpretation of treaties

A confirmation of the applicability of the general rules of international treaty law to community interest norms may be found in the rules and principles pertaining to treaty interpretation in international customary treaty law (captured as they are by

²⁸ See Andreas L. Paulus, *Reciprocity Revisited*, in *FROM BILATERALISM TO COMMUNITY INTEREST*, *supra* note 2, 97. See also Elisa Morgera, *Bilateralism at the Service of Community Interests? Non-Judicial Enforcement of Global Public Goods in the Context of Global Environmental Law*, 23 EUR. J. INT’L L. 743 (2012).

²⁹ See Klabbers, *supra* note 5, at 770.

³⁰ See David J. Bederman, *Third Party Rights and Obligations in Treaties*, in *THE OXFORD GUIDE TO TREATIES* 328, 341–45 (Duncan B. Hollis ed., 2014).

³¹ See Study Group on the Fragmentation of International Law, *supra* note 17, ¶¶ 172–74.

³² See Samantha Besson, *The Sources of International Human Rights Law*, in *THE OXFORD HANDBOOK ON THE SOURCES OF INTERNATIONAL LAW* 837 (Samantha Besson & Jean d’Aspremont eds., 2017); Matthew Craven, *Legal Differentiation and the Concept of the Human Rights Treaty in International Law*, 11 EUR. J. INT’L L. 489 (2000).

³³ See also Keith, *supra* note 5, at 761–65, 767.

Articles 31–32 of the VCLT³⁴). Those rules and principles can indeed accommodate treaties that contain reciprocal as much as nonreciprocal duties.³⁵ As a matter of fact, the methods encountered in those provisions are very close to those used to interpret domestic legislation (in all its variety). They focus on the treaty’s meaning in context with an emphasis on the system and the object and purpose of the treaty in each case.³⁶

Of course, there are no rules under international treaty law that indicate expressly that the interpretation of treaties *should* be done in the light of community interests.³⁷ Still, the issue may arise when community interest norms are to be interpreted or bear on the interpretation of other norms of international law because they apply to and bind states concurrently. It is important therefore to know how the interpretation of community interest norms, but also of other norms than community interest norms by reference to community interest norms, should be handled.³⁸

Community interests may be taken into account in treaty interpretation through different channels, and more particularly through different “canons” or “methods” of interpretation. These may apply separately or in combination, depending on the case. Neither of them is superior to the others.³⁹ The first channel is systemic interpretation of a community interest norm, or of a norm other than a community interest norm, by reference to other community interest norms according to Article 31(3)(c) of the VCLT; the second is evolutive interpretation of a community interest norm, or of a norm other than a community interest norm, according to Article 31(3)(b) of the VCLT; and the third is teleological interpretation of a community interest norm, or of a norm other than a community interest norm, by reference to community interest norms according to Article 31(1) of the VCLT. The interpretation of international human rights treaties constitutes our focal example in each case because of their interesting characteristics in all three respects.⁴⁰

1. Systemic interpretation

The first channel for the interpretation of norms other than community interest norms, or of community interest norms themselves by reference to other community interest norms, may be systemic interpretation along the lines of Article 31(3)(c) of the VCLT. The provision refers to “any relevant rules of international law applicable in the relations between the parties.”

³⁴ See RICHARD GARDINER, *TREATY INTERPRETATION* 13–20 (2d ed. 2015). See also Int’l Law Comm’n, *Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties*, U.N. Doc. A/CN.4/L.813 (May 24, 2013).

³⁵ See also Klabbers, *supra* note 5, at 777–79.

³⁶ According to the International Law Commission, the “nature” of a treaty (e.g., a treaty including community interest norms) should not affect the default applicability of the general rules of interpretation under the VCLT, *supra* note 9. See, e.g., Int’l Law Comm’n, *supra* note 34; Int’l Law Comm’n, *Rep. on the Work of Its Sixty-Fifth Sess.*, ¶ 16, U.N. Doc. A/68/10 (2013).

³⁷ Gaja, *supra* note 2, at 63–64.

³⁸ See also *id.* at 62–63.

³⁹ See Int’l Law Comm’n, *Law of Treaties*, [1966] 1(2) Y.B. Int’l Law Comm’n 219, 219–20.

⁴⁰ It is actually common among international human rights lawyers to approach international human rights law as a self-contained regime with special rules pertaining to sources and interpretation (see also *Mamatkulov v. Turkey*, 2005-I Eur. Ct. H.R. 293, ¶ 111). *Contra* Besson, *supra* note 32.

In a nutshell, this reference to “other law” is usually interpreted to mean (i) any other norm of international law (rule or principle) (ii) binding the parties (iii) either (a) to the interpreted treaty when that treaty is multilateral and includes duties *erga omnes partes* or (b) to the dispute in other cases.⁴¹ This includes therefore general international law norms, such as customary international law or general principles, but also multilateral treaties binding the parties to the treaty.⁴² Systemic integration enables the interpreter to bring norms from other regimes and other sources into their search for meaning.⁴³ This explains why systemic interpretation has been described by McLachlan as a “master-key” in the international legal system.⁴⁴

“Other law” under Article 31(3)(c) of the VCLT may include many potential community interest norms. Although systemic integration does not necessarily imply that community interests should be taken into account, the broader normative context includes them and they *may* therefore be relevant.⁴⁵ Some may go one step further and argue that community interests *should* actually be taken into account in systemic interpretation. They could rely on the two presumptions made in the 2006 ILC Fragmentation Report and, more generally, on its argument for coherence⁴⁶ and “systemic integration”: “(a) the parties are taken to refer to customary international law and general principles for all questions which the treaty does not itself resolve in express terms; (b) in entering into treaty obligations, the parties do not intend to act inconsistently with generally recognized principles of international law.”⁴⁷ The first requirement may be derived from the arbitral sentence *Georges Pinson*,⁴⁸ whereas the second could be drawn from the ICJ decision in the *Case concerning Right of Passage over Indian Territory*.⁴⁹ Of course, systemic interpretation cannot necessarily resolve conflicts with community interest norms or guarantee that community interest norms are respected in priority thereafter.

One finds confirmation of the use of systemic interpretation for the promotion of community interests in practice. True, there was no trace of such systemic interpretation in the ICJ’s case law until the *Oil Platforms* case,⁵⁰ but there have been a few cases since then.⁵¹

In international human rights law, it is the practice of the ECtHR that encompasses most examples of systemic interpretation under Article 31(3)(c) of the VCLT. The

⁴¹ See, e.g., Jean-Marc Sorel & Valérie Boré Eveno, *Article 31: Convention of 1969*, in 1 THE VIENNA CONVENTIONS ON THE LAW OF TREATIES—A COMMENTARY 804, 825–29 (Olivier Corten & Pierre Klein eds., 2011); Richard Gardiner, *The Vienna Convention Rules on Treaty Interpretation*, in THE OXFORD GUIDE TO TREATIES, *supra* note 30, at 475, 485–87. See also Gaja, *supra* note 2, at 69.

⁴² Int’l Law Comm’n, 871st Mtg., [1966] 1(2) Y.B. Int’l Law Comm’n 192, ¶ 52.

⁴³ See also Study Group on the Fragmentation of International Law, *supra* note 17; Fouad Zarbiev, *Les règles d’interprétation de la Convention de Vienne sur le droit des traités: un outil d’harmonisation en droit international?*, in L’HARMONISATION INTERNATIONALE DU DROIT (Christine Chappuis, Thomas Kadner Graziano & Bénédicte Foex eds., 2007).

⁴⁴ See McLachlan, *supra* note 17, at 281. ⁴⁵ See Gaja, *supra* note 2, at 64.

⁴⁶ See Gaja, *supra* note 2, at 70.

⁴⁷ See Study Group on the Fragmentation of International Law, *supra* note 17, ¶ 465.

⁴⁸ *Pinson (Fr.) v. United Mexican States*, 5 R.I.A.A. 327, ¶ 422 (Perm. Ct. Arb. 1928).

⁴⁹ *Right of Passage over Indian Territory (Port. v. India)*, Judgment, 1960 I.C.J. Rep. 6 ¶ 142 (Apr. 12).

⁵⁰ *Oil Platforms (Iran v. U.S.)*, Judgment, 2003 I.C.J. Rep. 161, ¶¶ 41, 161 (Nov. 6).

⁵¹ See *Certain Questions of Mutual Assistance in Criminal Matters (Djib. v. Fr.)*, Judgment, 2008 I.C.J. Rep. 177, ¶¶ 112–13, 123 (June 4); *Pulp Mills*, *supra* note 24, ¶ 66.

Court refers to that provision to interpret its own regime’s community interest norms, that is, rights of the European Convention on Human Rights (ECHR), by reference to other community interest norms, whether these are other international human rights norms or other community interest norms. The practice started in 1975 and has become quite important in this respect.⁵² The same may be said about discussions thereof in the separate opinions of judges in some of these cases.⁵³ As a matter of fact, the ECtHR goes further than what Article 31(3) of the VCLT provides. Thus, in *Demir and Baykara*,⁵⁴ the Court referred to other law (the European Social Charter) that was not binding on all parties to the ECHR, and especially not on Turkey, a party in that dispute. To that extent, the Court may be said to interpret the ECHR as truly universal human rights law.⁵⁵ This may actually be justified by reference to another method of interpretation: Evolutive interpretation. It is interesting to note, in this respect, that the Court sometimes mentions both lit. b and c of Article 31(3) of the VCLT,⁵⁶ thereby straddling the two methods of interpretation.

2. Evolutive interpretation

The second channel for the interpretation of community interest norms, or of norms other than community interest norms, by reference to community interest norms may be evolutive interpretation along the lines of Article 31(3)(b) of the VCLT. The provision refers to “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.”

⁵² See, e.g., *Golder v. United Kingdom*, 18 Eur. Ct. H.R. (ser. A) ¶¶ 34–35 (1975); *Loizidou*, *supra* note 15, ¶¶ 43–44; *Al-Adsani v. United Kingdom*, 2001-XI Eur. Ct. H.R. 79, ¶ 55; *Fogarty v. United Kingdom*, 2001-XI Eur. Ct. H.R. 157, ¶¶ 35, 157; *McElhinney v. Ireland*, 2001-XI Eur. Ct. H.R. 37, ¶ 36; *Bankovic v. Belgium*, 2001-XII Eur. Ct. H.R. 333, ¶ 57; *Mamatkulov*, *supra* note 40, ¶¶ 111, 123; *Behrami v. France* 46 I.L.M. 746, ¶ 122 (Eur. Ct. H.R., May 2, 2007); *Maumousseau v. France*, 2007 Eur. Ct. H.R. 1204 ¶ 60; *Carlson v. Switzerland*, Eur. Ct. H.R. ¶ 68 (2008), <http://hudoc.echr.coe.int/eng?i=001-89410>; *Demir v. Turkey*, 2008-V Eur. Ct. H.R. 333, ¶¶ 60–68; *Andrejeva v. Latvia*, 2009-II Eur. Ct. H.R. 1, ¶ 19; *Rantsev v. Cyprus*, 2010-I Eur. Ct. H.R. 65, ¶¶ 273–74; *Al-Saadoon v. United Kingdom*, 2010-II Eur. Ct. H.R. 61, ¶ 126; *Cudak v. Lithuania*, 2010-III Eur. Ct. H.R. 121, ¶ 56; *Neulinger v. Switzerland*, 2010-V Eur. Ct. H.R. 117, ¶ 131; *Raban v. Romania*, Eur. Ct. H.R. ¶ 28 (2010), <http://hudoc.echr.coe.int/eng?i=001-101471>; *Sabeh El Leil v. France*, Eur. Ct. H.R. ¶ 48 (2011), <http://hudoc.echr.coe.int/eng?i=001-105378>; *Šneerson v. Italy*, Eur. Ct. H.R. ¶ 85 (2011), <http://hudoc.echr.coe.int/eng?i=001-105624>; *Hirsi Jamaa v. Italy*, 2012-II Eur. Ct. H.R. 1, ¶¶ 170–71; *M.R. v. Estonia*, Eur. Ct. H.R. ¶ 137 (2012), <http://hudoc.echr.coe.int/eng?i=001-111198>; *Wallishauser v. Austria*, Eur. Ct. H.R. ¶ 59 (2012), <http://hudoc.echr.coe.int/eng?i=001-112194>; *Nada v. Switzerland*, 2012-V Eur. Ct. H.R. 115, ¶ 169; *Oleynikov v. Russia*, Eur. Ct. H.R. ¶ 56 (2013), <http://hudoc.echr.coe.int/eng?i=001-117124>; *X. v. Latvia*, 2013-VI Eur. Ct. H.R. 319, ¶ 92; *Al-Dulimi v. Switzerland*, Eur. Ct. H.R. ¶ 112 (2013), <http://hudoc.echr.coe.int/eng?i=001-138948>; *National Union of Rail, Maritime and Transport Workers v. United Kingdom*, 2014-II Eur. Ct. H.R. 1, ¶ 76; *Margus v. Croatia*, 2014-III Eur. Ct. H.R. 1, ¶ 129; *Cyprus v. Turkey*, 2014-II Eur. Ct. H.R. 245, ¶ 23; *Hassan v. United Kingdom*, Eur. Ct. H.R. ¶¶ 100–103 (2014), <http://hudoc.echr.coe.int/eng?i=001-146501>.

⁵³ See, e.g., the opinions in *National Union of Rail, Maritime and Transport Workers*, *supra* note 52; the opinions in *Hirsi Jamaa*, *supra* note 52.

⁵⁴ *Demir and Baykara*, *supra* note 52, ¶¶ 85–86. See also *National Union of Rail, Maritime and Transport Workers*, *supra* note 52, ¶¶ 76, 98.

⁵⁵ See also Samantha Besson, *Human Rights as Transnational Constitutional Law*, in HANDBOOK ON GLOBAL CONSTITUTIONALISM 234 (Anthony Lang & Antje Wiener eds., 2017).

⁵⁶ See, e.g., *Hassan*, *supra* note 52, ¶ 102.

In a nutshell, what this covers is (i) a subsequent practice (ii) among all parties to the treaties (iii) that is sufficiently substantiated to establish their respective consent.⁵⁷ This is particularly important for evolutive concepts used in certain treaties; community interest norms are actually often couched in treaties using evolutive concepts (e.g., “human rights” or “sustainable development”).

Importantly, the evolution of concepts embedded in a treaty does not necessarily imply that protection of community interests is strengthened by evolutive interpretations. However, the possibility of taking into account recent developments is likely to provide an opportunity to read into a treaty a meaning that could enhance their protection.⁵⁸ One finds confirmation of the use of evolutive interpretation for the promotion of community interests in practice. There are traces thereof in some of the ICJ’s case law.⁵⁹

In international human rights law, it is the practice of the ECtHR that encompasses most examples of evolutive interpretation.⁶⁰ There are fewer examples of evolutive interpretation than of systemic interpretation in the Court’s case law, however. As I mentioned before, in any case, certain cases are decided under both lit. b and c of Article 31(3) of the VCLT⁶¹ or without mentioning Article 31 of the VCLT at all,⁶² thereby making such quantitative assessments moot. Some authors argue that the ECtHR’s notion of “dynamic” interpretation and its approach to the ECHR as a “living instrument”⁶³ go beyond what is allowed under evolutive interpretation in the VCLT.⁶⁴ This is an exaggeration, however. A confirmation may be found in the “European consensus” requirement developed by the Court. Before endorsing a new evolutive interpretation of the Convention, the Court first establishes the existence of a subsequent transnational practice supporting such an interpretation. In the absence of the latter, states are granted a broad margin of appreciation.⁶⁵ This condition in the reasoning comes close to requiring some sort of consolidated transnational human

⁵⁷ See, e.g., Gardiner, *supra* note 41, at 498. See also Georg Nolte, *Introduction*, in *TREATIES AND SUBSEQUENT PRACTICE 1* (Georg Nolte ed., 2013).

⁵⁸ See Gaja, *supra* note 2, at 66.

⁵⁹ See *Gabčíkovo-Nagymaros Project* (Hung. v. Slov.), Judgment, 1997 I.C.J. Rep. 7, ¶ 112 (Sept. 25) [hereinafter *Gabčíkovo-Nagymaros*]; *Ahmadou Sadio Diallo* (Guinea v. Dem. Rep. Congo), Judgment, 2010 I.C.J. Rep. 639, ¶ 68 (Nov. 30); *Dispute Regarding Navigational and Related Rights* (Costa Rica v. Nicar.), Judgment, 2009 I.C.J. Rep. 213, ¶ 64 (July 13); *Application of the Interim Accord of 13 September 1995* (Maced. v. Greece), Judgment, 2011 I.C.J. Rep. 644, ¶ 99 (Dec. 5); *Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the Temple of Preah Vihear* (Cambodia v. Thailand) (Cambodia v. Thai.), Judgment, 2013 I.C.J. Rep. 281, ¶ 75 (Nov. 11); *Whaling in the Antarctic* (Austl. v. Japan: N.Z. intervening), Judgment, 2014 I.C.J. Rep. 226, ¶ 83 (Mar. 31).

⁶⁰ See *Cruz Varas v. Sweden*, 201 Eur. Ct. H.R. (ser. A) ¶ 100 (1991); *Loizidou v. Turkey*, 310 Eur. Ct. H.R. (ser. A) ¶¶ 67, 73 (1995); *Hassan*, *supra* note 52, ¶¶ 100–103; *National Union of Rail, Maritime and Transport Workers*, *supra* note 52, ¶ 76.

⁶¹ See, e.g., *Hassan*, *supra* note 52, ¶ 102.

⁶² See, e.g., *Lautsi v. Italy*, 2011-III Eur. Ct. H.R. 61, ¶ 61; *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) ¶ 103 (1989).

⁶³ See, e.g., *Tyrer v. United Kingdom*, 26 Eur. Ct. H.R. (ser. A) ¶ 31 (1978).

⁶⁴ See, e.g., Basak Cali, *Specialized Rules of Treaty Interpretation: Human Rights*, in *THE OXFORD GUIDE TO TREATIES*, *supra* note 30, at 525, 538–41; Malgosia Fitzmaurice, *Interpretation of Human Rights Treaties*, in *THE OXFORD HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW* 739, 740 (Dinah Shelton ed., 2013).

⁶⁵ See, e.g., *Lautsi*, *supra* note 62, ¶ 61.

rights practice and, arguably, even a human rights custom.⁶⁶ The ascertainment of the “European consensus” may therefore be equated with the establishment of the agreement between parties required by Article 31(3)(b) of the VCLT.

3. Teleological interpretation

The third channel for the interpretation of community interest norms, or of norms other than community interest norms by reference to community interest norms, may be teleological interpretation along the lines of Article 31(1) of the VCLT. The provision refers to the treaty’s “object and purpose.” In a nutshell, what this two-pronged notion refers to is the idea that meaning should capture purpose (usually of the whole treaty).⁶⁷ Of course, purpose itself may be in need of interpretation. This explains why teleological interpretation is deemed controversial by some authors.⁶⁸

Importantly, reference to the purpose of a treaty does not necessarily imply that protection of community interests will be strengthened. However, taking a community interest norm’s purpose, that is, the protection of given community interests, into account is likely to provide an opportunity to read into a treaty a meaning that would enhance the protection of community interests.⁶⁹ One finds confirmation of the use of teleological interpretation for the promotion of community interests in practice. There are traces thereof in some of the ICJ’s case law,⁷⁰ even if it has been controversial at times.⁷¹ In international human rights law, it is the practice of the ECtHR that encompasses most examples of teleological interpretation under Article 31(1) of the VCLT and is used to interpret ECHR rights.⁷²

What is most common, however, is for international courts to combine systemic and/or evolutive interpretations with teleological interpretation by including a reference to the purpose of the treaty.⁷³ This has been the case in ICJ judges’ separate opinions, in particular.⁷⁴ Interestingly, the ECtHR also combines evolutive interpretation with teleological interpretation to the extent that it interprets ECHR rights dynamically by reference to their purpose (a kind of “teleo-evolutive” interpretation).

⁶⁶ See, e.g., Ineta Ziemele, *Customary International Law in the Case Law of the European Court of Human Rights*, in *THE JUDGE AND INTERNATIONAL CUSTOM* (Conseil de l’Europe 2012); Samantha Besson, *Human Rights Adjudication as Transnational Adjudication—Putting Domestic Courts as International Law Adjudicators in Perspective*, in *INTERNATIONAL LAW*, 10 ESIL PROC. 43 (Mary Footer & August Reinisch eds., 2016).

⁶⁷ See, e.g., Sorel & Boré Eveno, *supra* note 41, at 832.

⁶⁸ See, e.g., Jan Klabbbers, *Some Problems Regarding the Object and Purpose of Treaties*, 8 FINNISH Y.B. INT’L L. 138 (1997); Zarbiev, *supra* note 5, at 207.

⁶⁹ See Gaja, *supra* note 2, at 70. See also Study Group on the Fragmentation of International Law, *supra* note 17, ¶ 21.

⁷⁰ See, e.g., *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, 1951 I.C.J. Rep. 15, 23 (May 28); *Gabčíkovo-Nagymaros*, *supra* note 59, ¶ 112.

⁷¹ See *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* note 70, at 49 (dissenting opinion of Judge Alvarez).

⁷² See Al-Saadoon, *supra* note 52, ¶ 127.

⁷³ See Zarbiev, *supra* note 5, at 223; Sorel & Boré Eveno, *supra* note 41, at 833–34.

⁷⁴ See, e.g., *Oil Platforms*, *supra* note 50, separate opinion of Judge Simma, ¶ 6; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. Rep. 226, ¶ 200 (July 8) (separate opinion of Judge Weeramantry).

This confirms the idea that teleological interpretation is a hybrid of systemic and evolutive interpretation.⁷⁵

V. Community Interests and the Identification of Customary International Law

To present and assess how community interests are involved in the identification of customary international law, this section discusses how they fit secondary rules on the formation of customary international law, before turning to the latter's identification itself. This structure echoes the one used in the previous section to discuss the applicability of international treaty law to community interest norms, first with respect to general treaty-making rules and then in the context of treaty-interpretation.⁷⁶

A. Community interests in the secondary rules on customary international law

Customary international law arises from the combination of two elements: A general, regular, and coherent practice of states (*consuetudo*) and their conviction that that practice is binding as law (*opinio juris*). Even though the ascertainment of the two elements is more and more conflated in practice (through double-counting or privileging *opinio juris* over practice, precisely to promote community interests in case of insufficient state practice),⁷⁷ they are still considered as distinct steps in the formation of custom in practice⁷⁸ and rightly so because custom amounts, conceptually and structurally, to a normative practice.⁷⁹

Customary international law is often described as the primary source for the promotion and protection of community interests. This is because, as I explained in the previous chapter, it is general in its personal scope and corresponds to that extent to the collective nature of the holders and/or bearers of many community interest norms.⁸⁰ As a matter of fact, its general scope is also what explains its being the most suitable source of international human rights law since the personal scope of human rights and their corresponding duties is universal.⁸¹ However, as I also argued, the general or multilateral nature of customary international law *qua* source does not necessarily imply the multilateral nature of the rights and duties it contains. As a matter of fact, it may contain many juxtaposed bilateral norms and duties depending on their

⁷⁵ See Int'l Law Comm'n, Rep. on the Work of Its Sixty-Third Sess., *Text of the Guide to the Practice on Reservations to Treaties*, U.N. Doc. A/66/10/Add.1, at 352–53 (2011) (para. 3 to the commentary to guideline 3.1.5).

⁷⁶ On the relationship between (customary law) "identification" and (treaty) "interpretation," see Besson & Ammann, *supra* note 21, at 93–98.

⁷⁷ Fisheries (U.K. v. Nor.), Judgment, 1951 I.C.J. Rep. 116 (Dec. 18); Nicaragua case, *supra* note 24.

⁷⁸ See Int'l Law Comm'n, Identification of Customary International Law—Text of the Draft Conclusions Provisionally Adopted by the Drafting Committee, U.N. Doc. A/CN.4/L.872 at 2 (May 30, 2016) (Draft Conclusion 3(2)).

⁷⁹ See Besson, *supra* note 32. ⁸⁰ See Gaja, *supra* note 2, at 43–44.

⁸¹ See, for a full argument, Besson, *supra* note 32. *Contra* Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens and General Principles*, 12 AUSTL. Y.B. INT'L L. 82 (1992).

subject matter. And, conversely, many treaties include multilateral duties and community interest norms.

Curiously, some authors have argued that the practice element in the formation of customary international law favors reciprocity and bilateral practices and prevents it, as a result, from being an adequate international law source for the protection of community interests.⁸² This argument should be rejected, however. As I argued in the previous chapter, indeed, the requirement of state consent in international law-making, including customary lawmaking, should be dissociated from the reciprocity or mutuality of the duties generated thereby. Some custom-constitutive practices are unilateral or bilateral, while remaining general, while others are multilateral and can account for the formation of customary community interest norms, as a result.

B. Community interests in the identification of customary international law

There are no secondary rules of international customary law that indicate that the identification of custom *should* be done in the light of community interests.

However, the issue may arise when customary community interest norms are to be identified or bear on the identification of other norms of customary international law because they apply to and bind states concurrently. It is important therefore to know how the identification of customary community interest norms or of other customary law norms than community interest norms by reference to community interest norms should be handled. Some of the materials considered significant for the identification of customary international law by the ILC's Draft Conclusions on the Identification of Customary International Law⁸³ may actually contribute to the inclusion of community interests, even though some issues remain with the basic approach used in the identification process and its ability to accommodate community interests.

1. Significant materials for the identification of customary international law

Among the various features of the customary law identification process and the materials used in that process that may enhance the consideration of community interests, one should mention the following three.

First is the role of *general principles*. The ambiguous relationship between general principles of international law (*qua* norm and *qua* source) and customary international law, discussed in the previous section, indirectly confirms the important role certain customary law principles may have for the protection of community interests.⁸⁴ A lot of customary law is of a principled nature, indeed. This applies particularly in international human rights law. In practice, moreover, some of those principles tend to be identified without going through the two-element identification process applicable to customary law, and hence independently from their source. This is what happened in the ICJ's *Pulp Mills* case,⁸⁵ for instance, but also in others where the Court did

⁸² See Paulus, *supra* note 28, at 94.

⁸⁴ See also Gaja, *supra* note 2, at 42.

⁸³ See Int'l Law Comm'n, *supra* note 78.

⁸⁵ *Pulp Mills*, *supra* note 24, ¶ 204.

not state clearly whether it regarded a principle as a general principle under Article 38(1)(c) of the ICJ Statute or as a customary principle.⁸⁶

Second is the reference to *treaties*. When ascertaining the existence of a practice or *opinio juris*, it is common for domestic or international institutions to refer to treaties on these issues. This is because treaties may codify existing customs or contribute to their crystallization or even to their formation (ILC's Draft Conclusion 11⁸⁷). This is particularly the case regarding multilateral treaties, including treaties protecting or referring to community interest norms, like international human rights treaties⁸⁸ or international environmental law treaties. Thus, if domestic or international institutions can bring in customary international law to bear on the systemic or evolutive interpretation of treaties in the light of community interest norms, as I explained before, the reverse can happen too. What remains open, however, is whether further inspiration may be drawn from systemic or evolutive interpretation in treaty law for systemic or evolutive identification of customary law. The coherence or integrity argument certainly applies equally well to customary international law. Moreover, there is no additional consent-based objection to be raised here that could not be raised and put to rest in treaty law. This is, on the one hand, because of the compatibility in principle between state consent and the protection of community interests, as I explained in the previous chapter, and, on the other, because (democratic) state consent is inherently limited by reference to the grounding democratic value of equality and the corresponding community interest norms like nondiscrimination rights or *jus cogens* norms.

Third is the reference to *international institutional evidence*. One of the interesting features of the identification of customary international law is how much evidentiary credit the identifying (domestic or international) institutions should give to (other) international institutions' confirmations of state practice and *opinio juris*. This is particularly the case regarding the weight that is usually given to past international judicial decisions (ILC's Draft Conclusion 13), especially by the ICJ or the ECtHR, but also to international organizations' law in general (ILC's Draft Conclusion 12), both types of international institutions being recognized platforms for the development of community interest norms. Another kind of evidentiary material encountered, and which may contribute to bringing some community interests to bear on identification, are nongovernmental organizations' (NGOs') compilations of state practice, professional international law associations' recommendations, or the ILC's own reports, conclusions, and articles. This matters particularly in international customary human rights law where the practice of international human rights institutions, especially monitoring bodies and courts, when it relies on states' contextual and evolutive specifications of international human rights law (see the discussion of Article 31(3)(b) of the VCLT above), could be used as evidence of (inter-)state practice and contribute to the identification of customary human rights law. There is a certain circularity loop at play here between the

customary and conventional nature of international human rights law, but it is virtuous and corresponds to the transnational nature of human rights.⁸⁹

2. Issues with the basic approach to the identification of customary international law

There are two notable difficulties in the basic approach to the identification of customary international law that may hamper the consideration of community interests in practice.

First is the *self-referential* invocation of *domestic practice* and *opinio juris*. As was the case in the context of treaty interpretation, due to the decentralized structure of international law implementation, states and their domestic authorities are the main actors identifying customary international law. As I argued, however, this should not per se be considered an obstacle to the protection of community interests. On the contrary, it may lead to the diversification of perspectives and conceptions thereof in new circumstances, and thereby enhance the consideration of community interests.

Nevertheless, the feature of that decentralized domestic practice of identification of customary international law that may stand in the way of taking community interests into account is the domestic authorities' tendency, when identifying an international customary law norm, to refer (primarily or exclusively) to their own practice and *opinio juris*, and not to other states' with an eye to generality. By contrast, this issue does not arise in the international identification of customary international law. Indeed, international institutions have to make sure, based on a comparative survey, that the practice and *opinio juris* assessed are sufficiently general.⁹⁰ There are many explanations for this self-referential tendency: Some relate to institutional laziness and limited comparative resources, while others pertain to the duality of domestic/international functions of governmental authorities and the difficulty for them to keep the identification of custom separate from their contribution to its formation, and even, arguably, their inability to differentiate between the identification of custom and compliance with a domestic institutional precedent rule in the identification of custom.⁹¹

Again, however, it is not clear that customary self-reference is necessarily self-interested and plays against the consideration of community interests. After all, as I explained in the previous chapter, states also have (domestic and global) collective interests and their prior practice they are actually referring to in the identification of customary law may already be oriented toward the protection of community interests.

⁸⁹ See Besson, *supra* note 32.

⁹⁰ For a critique of the ICJ's deductive or even assertive instead of inductive "method," however, see, e.g., Stefan Talmon, *Determining Customary International Law: The ICJ's Methodology Between Induction, Deduction and Assertion*, 26 EUR. J. INT'L L. 417 (2015). For a discussion, see Omri Sender & Michael Wood, *The International Court of Justice and Customary International Law: A Reply to Stefan Talmon*, EJIL: TALK! (Nov. 30, 2015), <http://www.ejiltalk.org/the-international-court-of-justice-and-customary-international-law-a-reply-to-stefan-talmon/>.

⁹¹ For a discussion of the Swiss practice in this respect, see Besson & Ammann, *supra* note 21, at 37, 78, 126–29 with numerous references. See, generally, Simonetta Stirling-Zanda, *The Determination of Customary International Law in European Courts (France, Germany, Italy, The Netherlands, Spain, Switzerland)*, 4 NON-ST. ACTORS & INT'L L. 3, 9 (2004).

⁸⁶ See also d'Argent, *supra* note 23.

⁸⁷ Int'l Law Comm'n, *supra* note 78. See also Wood, *Third Rep.*, *supra* note 6, ¶¶ 31–44, esp. ¶ 41.

⁸⁸ See, e.g., Barcelona Traction case, *supra* note 14, ¶¶ 33–34; Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), Judgment, 2012 I.C.J. Rep. 422, ¶ 99 (July 20).

As a matter of fact, self-reference may be used intentionally by a state to set a multi-lateral or general trend in the international formation of customary international law itself. This can actually be the case for customary community interest norms, as in international human rights law or international humanitarian law.⁹²

Second is the role of *especially affected states*. Another feature of the practice of identification of customary international law that may be of concern is the weight given to states whose interests are specially affected in the process of ascertainment of the representative nature of the relevant practice (ILC's Draft Conclusion 8(1)).⁹³ This requirement could clearly prevent the reference to community interests or, at least, to those interests' conceptions embedded in the practice of states that are not specially affected.

The extent to which this could influence the respect of community interests remains open, however. After all, community interests are presumably of equal concern to all states and hence affect them all equally and not specially.⁹⁴ Moreover, even if some states are considered to be specially affected by issues pertaining to community interests (e.g., an archipelagic state threatened by the rise of sea level due to global warming), the requirement that their practice be taken into account specially need not threaten the protection of community interests and may simply be epistemologically superior as a result of practice—provided, as I argued in the previous chapter, states' conceptions of community interests are not approached as necessarily self-interested. Of course, and to go back to the previous point, the more specially affected a state is, the more likely it is to refer to its own domestic practice and *opinio juris* when identifying customary international law.⁹⁵ Interestingly, the latest version of the ILC's Draft Conclusions on the identification of customary international law no longer refers to the requirement of special affectedness among those conditioning the representative nature of the practice (ILC's Draft Conclusion 8(1)).

VI. Conclusions

The relevance of community interests in treaty interpretation and customary identification of community interest norms, or of other international law norms by reference to community interest norms, is as indeterminate and difficult to assess as the notion of community interests itself.

The gist of this chapter's argument has been that the rules pertaining to the interpretation of treaties and the identification of custom provide many routes for states, their domestic authorities and international institutions to include and protect community interests. Unlike the formation of a given abstract norm, its identification and

interpretation in a concrete case may actually allow for other interests, including community interests, and/or distinct or more recent conceptions thereof, to be taken into account. This is because of the other norms and duties applying concurrently in these cases and potentially conflicting with them, but also of the (many) other domestic and international institutions involved in that process, especially judicial ones.

Moreover, certain secondary rules applicable to the interpretation of treaties and the identification of customary law may even include duties to refer to community interest norms or, at least, secure the conditions for such a consideration to take place. True, more transparency and discipline are required in the implementation of those treaty interpretation and customary identification rules to pursue community interests effectively. This is the case, for instance, as illustrated in the international human rights practice, regarding the conditions for systemic and evolutive treaty-interpretation or the generality of the practice requirement in the otherwise self-referential identification of customary law.

Importantly, however, none of those rules has to be bent to get there. Concerns about the necessary bilateral features of treaties and custom, but also, accordingly, of the rules for their identification and interpretation, are largely misguided, indeed. Treaties and custom do not necessarily give rise to duties that are reciprocal in structure. As to the alleged self-interested features of state consent in international law-making, they are exaggerated; they underestimate the collective nature, but also the potential contribution of the institutional design of states, especially democratic states, for the protection of domestic and international community interests. In the absence of a central international lawmaker able to determine our community interests in a democratic way, we should not too quickly disparage the only dimension of international lawmaking we have that gives (states)people an equal albeit separate voice in determining their community interests, that is, their democratic state's consent.

⁹² See, for example, the Swiss practice, in Besson & Ammann, *supra* note 21, at 132–35, 169.

⁹³ See North Sea Continental Shelf (Fed. Rep. of Ger./Den., Fed. Rep. of Ger./Neth.), Judgment, 1969 I.C.J. Rep 3, ¶ 74 (Feb. 20). See also Wood, *Second Rep.*, *supra* note 6, ¶ 54.

⁹⁴ See, e.g., Legality of the Threat or Use of Nuclear Weapons, *supra* note 74, at 414 (separate opinion of Judge Shahabuddeen). See also *id.* at 535–36 (Separate Opinion of Judge Weeramantry). But see Sienho Yee, *Report on the ILC Project of Customary International Law*, 14 CHINESE J. INT'L L. 375, §§ 47–53 (2015).

⁹⁵ See, e.g., the Swiss practice, in Besson & Ammann, *supra* note 21.